FEDERATION REPORTS

BAN KOK HOTEL v. LOW PHEK CHOON.

[Court of Appeal (Pretheroe, Ag. C.J., Russell and Briggs, JJ.) August 30, 1950]

[F.M. — Civil Appeal No. 14 of 1950]

Landlord and tenant — Agreement of tenancy — Interpretation — Meaning of "rent".

The appellants who were the lessees of the whole of certain premises at 159 Acheen Street, Penang, leased part of these premises to the respondent. The terms of this sub-lease were contained in an agreement in writing dated the 30th day of September, 1942, and the rent which the respondent agreed to pay was $60/- per month. This agreement contained a forfeiture clause to take effect on the rent being in arrears, and a clause as to permissible increments in the rent which read as follows: "Should there be an increase of rent over $100/- by the landlord, we the lessees shall pay 15% more (rent) and should the increase be under $100/-, 20% more should be paid accordingly." The pre-occupation rent of the whole of the premises was $150/- per month but the premises were first leased to the appellants in July 1942 during the occupation and the appellants paid the sum of $75/- per month for the right of occupying the same. There was in force then a Japanese decree which allowed landlords to collect from their tenants a sum not exceeding 50% of the pre-occupation rent. In 1943 and 1944 two subsequent Japanese decrees permitted landlords to collect up to firstly 75% and then up to 85% of the pre-occupation rent. As a result of these decrees the appellants raised the rent of the respondent under the provisions of the agreement firstly to $72/- per month and then to $86.40 per month. These increases were duly paid by the respondent without objection. In September 1945 after the re-occupation the appellants paid the pre-occupation rent of $150/- per month and in January 1947 the appellants increased the respondent's rent to $103.68 per month. In March 1948 the rent payable by the appellants was allowed to be increased to $187.50 under the provisions of the Control of Rent Ordinance, 1948, and the appellants therefore increased the rent of the respondent to $124.40. These increases were also duly paid by the respondent without objection until March 1949 when he became in arrears with his rent. The appellants then sued for possession and for the first time the respondent claimed that the above increases of rent had been improperly made and that the rent had been overpaid. At the trial, the learned trial Judge found that the only permissible increase was the one in March 1948, and that therefore the rent payable by the respondent was $60/- per month up to that date and $72/- per month thereafter. He therefore dismissed the appellants' claim. The appellant appealed.

Held, (1) that the rent of the premises at the date of the agreement was the sum actually payable by the appellant to the landlord, that is $75/- per month; (2) that the increases made by the appellants were authorised increases and as the rent had been in arrears, the appellant was entitled to an order for possession.

CIVIL APPEAL.

R. D. Hume for the appellants.

Lim Kheng Kooi for the respondent.

Cur. Adv. Vult.

Pretheroe, Ag. C.J. : — In July, 1942, the appellants became the lessees of certain premises in Acheen Street, Penang, at a rental of $150 *per mensem*. In the previous March, however, the Japanese authorities had "issued a decree" which had the effect of reducing the rent payable in respect of leased premises in the Settlement of Penang by fifty *per centum* so that in fact the appellants only paid $75 *per mensem* to their landlord. No copy of this decree was before the Court and no counsel appearing in the appeal had ever seen a copy, but the effect of the decree was not disputed. In September, 1942, the appellants granted a sub-lease of a portion of the premises to two persons, one of whom is the respondent in this appeal and in whom the whole interest is now vested. An agreement to lease was duly executed, and this appeal concerns the interpretation of a clause in that agreement. After reserving rent at the rate of $60 *per mensem* the agreement provided :—

> "Should there be an increase of rent over $100/- by the landlord, we the lessees shall pay 15% more (rent) and should the increase be under $100/-, 20% more should be paid accordingly."

The landlord referred to in this clause was, of course, the landlord of the whole premises while "the lessees" were the sub-lessees represented by the respondent in this appeal. In April, 1943, by another decree the Japanese authorities "authorised" landlords "to receive" 75% of the reserved rent and in April, 1944, yet another decree authorised landlords "to receive" 85% of the reserved rent. Following each decree the landlord increased the amount of rent payable by the appellants and in each case the appellants increase the rent of the respondent by the amount authorised by the agreement to lease. On the liberation, paragraph 7 of the Military Proclamation revoked the Japanese decrees and, for the first time since the appellants had been the lessees, the reserved rent of $150 *per mensem* became payable by them. They, in turn, increased the rent of their sub-lessees to $86.40 *per mensem*. In March, 1948, the landlord increased the appellants' rent to $157.50 *per mensem* and they in turn increased the respondent's rent to $124.40. The sub-lessee paid no rent in respect of the months of March and April, 1949, but on the 9th May, 1949, tendered three months rent which the appellants refused to accept as these proceedings had then been instituted. In these proceedings the appellants claimed, under the agreement, possession of that portion of the premises sub-leased to the respondent. The respondent denied that rent was in arrears and counter-claimed for a sum of $2,037.92 which he alleged had been overpaid as rent between October 1945 and June, 1949.

The learned trial Judge found that the landlord had only increased the rent on one occasion *viz:* in March, 1945, and that the other increases were entirely due to the decrees of the Japanese Government. He,

therefore, gave judgment in favour of the defendant and on the counter-claim awarded him $1,449.92 and costs. From that decision the appellants have appealed to this Court.

The appeal, as I see it, turns largely upon the interpretation of the word "rent" in the clause of the agreement which I have already quoted. At the time the agreement was executed did the parties refer to the reserved rent of $150 *per mensem* or to the $75 *per mensem* which the appellants were actually paying? The evidence shows that on three occasions, between October, 1945, and January, 1949, the appellants increased the respondent's rent, and on each occasion the increase was a percentage of the increase imposed on the appellants by their landlord. Respondent paid the increased rent and made no protest until after this suit had been instituted. I regard this acquiescence by the respondent as a strong indication that he was then of opinion that the word "rent", as used in the agreement, had reference to the rate of $75 *per mensem*. For this reason I accept the evidence for the plaintiffs-appellants. It follows that, in my opinion, the successive increases of rent were made by the appellants in accordance with the terms of the agreement. Also, as the respondent was in arrears with the payment of his rent the agreement became void in accordance with a clause to that effect in the agreement.

The learned trial Judge was of the opinion that the rent was increased by the Japanese decree and not by the landlord. With great respect I cannot agree. The decrees merely fixed a maximum rent and left the landlord entirely free to charge any lesser sum. In fact the landlord increased the rent to the permitted maximum on each occasion when such increase was authorised by decree.

In my opinion, therefore, this appeal should be allowed. I would set aside the order made in the lower Court, grant possession to the appellants with effect from September 30th next, and give judgment for appellants on the counter-claim. Appellants should have their costs on the claim and counter-claim in this Court and in the Court below, and the sum of $800 deposited in Court should be paid out to appellants' solicitors.

Russell, J. : — The appellants who are the lessees of the whole of certain premises situated at 159 Acheen Street, Penang, leased part of these premises to the respondent. The terms of this sub-lease were contained in an agreement in writing dated the 30th day of September 1942 and the rent which the respondent agreed to pay was $60/- per month.

This agreement contained a forfeiture clause to take effect on the rent being in arrears and the following clause as to permissible increases in the rent which reads as follows :—

> "Should there be an increase of rent over $100/- by the landlord, we the lessees shall pay 15% more (rent) and should the increase be under $100/-, 20% more shall be paid accordingly."

The pre-occupation rent of the whole of the premises was $150/- per month but the premises were first leased to the appellants in July 1942 during the occupation and the appellants paid the sum of $75/- for the right of occupying the same.

In July 1942 there was in force a Japanese "decree" the exact terms of which cannot be ascertained as no copy thereof is available. The parties were however agreed that under this decree landlords were only allowed to collect from their tenants a sum not exceeding 50% of the pre-occupation rent.

In 1943 and 1944 two subsequent Japanese "decrees" permitted landlords to collect up to firstly 75% and then up to 85% of the pre-occupation rent. As a result of these decrees the appellants raised the rent of the respondent under the provisions of the agreement of 30th of September 1942 firstly to $72/- per month and then to $86.40 per month.

In September 1945 after the re-occupation by the British forces the appellants paid the pre-occupation rent of $150/- per month and in January 1947 the appellants increased the respondent's rent to $103.68 per month.

In March 1948 the rent payable by the appellants was allowed to be increased to $187.50 under the provisions of the Control of Rent Ordinance, 1948, and the appellants therefore increased the rent of the respondent to $124.40 per month.

All these increases were duly paid by the respondent without objection and in March 1949 he became in arrears with his rent. The appellants then sued for possession and for the first time the respondent claimed that the above increases of rent had been improperly made and that the rent had been overpaid. He also entered a counter-claim for the amount of the alleged overpayment.

The learned trial Judge found that the only permissible increase was the one in March 1948 and that therefore the rent payable by the respondent was $60/- per month up to that date and $72/- thereafter. He accordingly gave judgment for the respondent on the claim and counter-claim.

The first question to be decided is what was the rent of the whole of the premises payable by the

appellants to the landlord on the 30th of September 1942 when the agreement between the appellants and the respondent was made.

It was argued on behalf of the respondent that the rent of the premises at that date was still the pre-occupation rent of $150/- per month.

In *Stroud's* Judicial Dictionary, 2nd edition, at page 1710 the primary meaning of the word rent is defined as follows :—

"The sum certain, in gross, which a tenant pays his landlord for the right of occupying the demised premises."

The effect of the Japanese "decree" in force in 1942 referred to above was that no tenant of these particular premises should at that time pay more than $75/- per month. Furthermore the respondent called as a witness the son of the owner of the premises who also held a power of attorney from his father and this witness stated that the appellants refused to enter into a lease which had already been drawn up in which the rent was stated to be $150/- per month.

The landlord then allowed the appellants to go into occupation on payment of $75/- per month and I am of the opinion that that figure was the rent of the premises on September 30th, 1942. It was the sum agreed upon by the landlord and the appellants as payable by the latter for his use and occupation of the premises and was the highest sum that was payable by him under the Japanese decree in force at that time. There remains the question as to whether the above mentioned increases in the rent payable by the appellants were increases made by the landlord because it was only such increases that the appellants were permitted to make under the provisions of the agreement.

The learned trial Judge found that the increases other than that made in March 1948 were unauthorised. He found that the increase at that time was permissible under the provisions of the Control of Rent Ordinance, 1948. There is no doubt that this latter finding was correct and in my view the increases made under the Japanese "decrees" of 1943 and 1944 were similarly permissible. These decrees allowed a landlord to collect an increased rent and not unnaturally the appellants' landlord took the opportunity to do so.

The increase in the appellants' rent to $150/- in September 1945 was made under the pre-occupation legislation under which the pre-occupation rent could lawfully be demanded as paragraph 7 of the Military Administration (Proclamation No. 1) revoked all Proclamations and legislative Enactments of whatever kind issued by or under the authority of the Japanese Military Administration.

The respondent's tenancy was terminated under a forfeiture clause in the agreement and therefore the argument put forward on behalf of the respondent that the notice to quit was insufficient need not be considered.

I would allow this appeal with costs and order the respondent to pay the costs of the claim and counter-claim in the Court below. There should be an order for possession of the premises to be given up by the respondent not later than the 30th of September 1950 and judgment for the appellant for payment of such sum by the respondent as the Registrar may find on enquiry due for rent up to that date. If possession is not given up by that date an order for payment of double value to be made.

Briggs, J. : — The appellants in June, 1942 became the principal tenants of certain premises at Acheen Street, Penang. The rent of these premises before the Japanese occupation was $150 per month, but before the appellants' tenancy began the Japanese authorities had issued a "decree", the effect of which was to restrict the rights of landlords by forbidding them to collect any rent in excess of fifty per cent. of the pre-occupation rent. Unfortunately no copy of this "decree" has survived, but there is no dispute as to its practical effect. By reason of its provisions the rent which the head landlord could charge the appellants in the early part of their tenancy was limited to $75 per month. While this state of affairs obtained, the appellants gave a sub-tenancy of part of the premises to the respondent (and another person not now a party to the proceedings) under the terms of a written agreement dated 30th September, 1942. This reserved a monthly rent of $60 and contained the following provision for an increase of rent in certain events :—

"Should there be an increase of rent over $100/- by the landlord, we the lessees shall pay fifteen per cent. more (rent) and should the increase be under $100/-, twenty per cent. more shall be paid accordingly."

It also contained the following forfeiture clause :—

"If any rent is owing, Mr. Tan shall be at liberty to take legal proceedings (against the lessees) and the said Agreement shall be null and void."

"Mr. Tan" is described as the appellants' manager.

In April, 1943, the Japanese modified the restriction on rent so as to allow collection of seventy-five per cent. of the pre-occupation rent, and thereupon the appellants paid $112.50 per month instead of $75, and charged the respondent $72 per month instead of $60. In April, 1944, there was a further modification to allow collection of eighty-five per cent. whereupon

the appellants paid $127.50 and charged the respondent $86.40.

On the re-occupation the Japanese restrictions were removed, and subject to certain matters of detail to which I refer later, the appellants paid the pre-occupation rent of $150. They did not at once raise the rent of the respondent, but collected $86.40 until January, 1947, when they raised the respondent's rent to $103.68, the figure which presumably could have been charged when they began to pay $150. In March, 1948, the landlords became entitled in law to increase the rent of $150 to $187.50, and did so. At the same time the appellants began to charge $124.40, and did so until March, 1949, when the respondent allowed the rent to fall into arrears.

Thereafter the appellants sued for possession of the premises and the respondent defended the action, on the grounds that the increases of rent had been improperly made, that rent had been overpaid and that it was therefore not in arrears as alleged. The respondent counter-claimed for rent overpaid. The learned trial judge gave judgment for the respondent on the claim and for $1,449.92 on the counter-claim. This was on the basis that rent was payable by the respondent at $60 per month at all times prior to 1st March, 1948, and thereafter at $72 per month. The appellants appealed against both parts of the decision.

The appeal turns on the construction of the agreement and the effect of the Japanese decree, the precise questions being "What was the rent at the date of the agreement?" and "Were the subsequent increases, or any them, increases of rent by the landlord (*i.e.* the head landlord) within the meaning of the agreement, so as to entitle the appellants to increase the rent payable by the respondent?"

The matter may be put in two ways, first, on the basis that the meaning of the words is clear, and secondly, on the basis that the agreement contains a latent ambiguity.

The primary meaning of "rent" is given in *Stroud's* Judicial Dictionary (2nd edition 1710) as :—

"The sum certain, in gross, which a tenant pays his landlord for the right of occupying the demised premises."

Wharton's Law Lexicon (14th edition 866) gives this definition :—

"A certain profit issuing yearly out of lands and tenements corporeal."

The *Concise Oxford English Dictionary* gives the following primary meaning :—

"Tenant's periodical payment to owner or landlord for use of land or house or room."

It will be seen that these coincide fairly closely, and that both the legal and the colloquial meanings of the word emphasize that rent is the amount of money which in fact is paid or payable by the tenant to the landlord from time to time. There may be notional rents, standard rents, pre-occupation rents and many other rents which do *not* represent the amount actually and in fact paid; but all these demand a qualifying adjective and, where no such adjective is used, I think "rent" means the rent in fact paid or payable for the time being. If that meaning led to some repugnancy or other grave difficulty of construction, one might have to look further, but it does not. I think therefore that that meaning was the true meaning of the word "rent" as used in the agreement, and that the rent of the appellants at the date of the agreement was $75 per month.

Were there then any increases of rent by the landlord so as to bring the provisions for increase of the respondent's rent into operation?

The respondent's case was that the increases of rent payable by the appellants were increases brought about by operation of law and were not increases "by the landlord". It would be more easy to deal with this point if the precise words of the Japanese decree were before us, but the effect of the evidence seems sufficiently clear, and it was not disputed by counsel that the decree did not merely postpone payment of the remainder of the pre-occupation rent, but expunged it. In 1942 the rent was reduced by operation of law, so far as I can ascertain, in precisely the same way as rents may be reduced by operation of law under the Rent Restriction legislation. At the time of the first increase, however, the situation was apparently quite different. The amended law did not operate directly to increase rents, but merely permitted landlords to collect a larger percentage of the pre-occupation rent. In other words, the law permitted landlords to increase rents, if they so desired. It may safely be presumed that most landlords would avail themselves of this right, and the landlord did so in this case. If my conclusion, drawn from the evidence, as to the effect of the Japanese decree is correct, there can be no doubt that in 1943 and 1944 the rent was increased "by the landlord".

This conclusion is in no way surprising. In 1948 section 6 of the Control of Rent Ordinance, 1948, provided that "it shall not be unlawful for a landlord to increase" rent in certain circumstances and within certain limits. Under this provision of law the landlord did increase the rent from $150 per month to $187.50. This increase appears to me to have been

precisely the same in its nature and effect as the increases in 1943 and 1944, and it was undoubtedly an increase "by the landlord".

The increase in 1945 stands on a slightly different footing. Soon after the re-occupation, the Japanese decree restricting the rent to a sum less than the pre-occupation rent ceased to have effect, and it was therefore lawful, in the case of a monthly tenancy, to give notice of an increase of rent within any statutory limits which might obtain — the limit in this case being the pre-occupation rent of $150 per month. In any case where there was a pre-occupation contract it may have been lawful to charge the pre-occupation rent without any notice at all. It seems from a letter dated 14th November, 1949, that on the re-occupation the landlord at first considered himself bound by a standard rent of $75, and that he collected only this amount in September, October and November, 1945, but thereafter collected in respect of those months a further sum making the rent up to $150 per month. I think that this also was an increase of rent "by the landlord" within the meaning of the agreement. This payment of the rent in two instalments, if I may so describe it, was not referred to in the oral evidence, which merely indicates payment of $150 from September, 1945. It almost certainly explains why, according to the other evidence, the appellants did not raise the rent of the respondent in September, 1945, but does not quite explain why they deferred doing so until January, 1947.

Although I am inclined to think that the agreement is unambiguous in its terms, I proceed to consider it on the basis that there is a latent ambiguity in the word "rent", which will admit evidence of the conduct of the parties in explanation of the word's meaning.

It is of some importance to note that at the outset of the appellants' tenancy the head-landlord sought to induce them to accept a lease in which the rent of $150 was mentioned, and that the appellants refused to do so. If they had done so, it might be easier to suppose that they had the figure of $150 in mind when the agreement of 30th September, 1942, was made.

It is much more important to observe that the respondent never protested against the successive increases of his rent at any time prior to his allowing the rent to fall into arrears, and so affording the appellants an opportunity to eject him. His case on this point was never clearly formulated, as far as I can see, until his defence was filed in this action, and even after that he shifted his ground more than once. The learned trial judge gave judgment in his favour for much more than his counsel said he was claiming. The respondent must have been well aware of the various Japanese decrees and their effect in increasing the *de facto* rent of the appellants. He also knew that the head-landlord could not possibly have raised the rent in April, 1943, above the figure of $150. It seems certain, therefore, that if at the time of making the agreement of 30th September, 1942, he had intended by the word "rent" to indicate the sum of $150 per month, he would have protested at the time of the first increase of his rent and would have refused to pay the $72 demanded. The only possible conclusion from this is that the "rent" which he had in contemplation was the figure of $75 per month, the rent which was in fact then paid.

Both lines of argument therefore lead me to the same conclusion, that the rent referred to in the agreement was the figure of $75 per month and the increases against the respondent were lawfully and properly made. In consequence the respondent was in arrears at the time when the action was brought and his tenancy could be and was determined under the forfeiture clause.

This tenancy was not determined by notice, but under the express provisions of the agreement. Accordingly the respondent's arguments as to insufficiency of the notice to quit are irrelevant.

I would allow this appeal and set aside the judgment of the learned trial judge both on the claim and on the counter-claim. On the claim there should be an order for possession of the premises on or before the 30th September, 1950, and an order that it be referred to the Registrar to enquire what sums are and will be due by the respondent to the appellants in respect of rent up to that date. There should be an order for payment of double value thereafter in the event of failure to deliver up possession. The counter-claim should be dismissed. The respondent should pay the appellants' costs of both claim and counter-claim in the Court below, and of this appeal. The deposit of $500 should be paid out to the appellants' solicitors.

Order accordingly.

YAACOB BIN LEBAI JUSOH v. HAMISAH BINTI SAAD.

[Court of Appeal (Pretheroe, Ag. C.J., Jobling and Briggs, JJ.) September 1, 1950]

[F.M. — Civil Appeal No. 22 of 1950]

Conveyance of land — Subsequent agreement by purchaser to re-sell the land to the vendor at the same price — Whether intention was to create a mortgage — Jual Janji.